

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (STAMP) NO.21930 OF 2006

L.K.C.Ahmed Mohiddin Kutty	Appellant
versus	
Municipal Corporation of Greater	
Mumbai and another	Respondents

Mr.B.Unnikrishnan for the appellant.

Shri N.V.Walawalkar, Sr.Advocate with
Mr.J.J.Xavier for respondent.

CORAM : A.S.OKA, J.
DATE OF RESERVING THE JUDGEMENT : 01.03.2007
DATE OF PRONOUNCING THE JUDGEMENT : 22.3.2007

JUDGEMENT :-

1. The Appellant-original plaintiff has taken exception to the judgement and decree dated 28th July 2006 passed by the learned Judge of the City Civil Court, Mumbai.

2. The appellant-plaintiff filed a suit for declaration that notice dated 5th March 2002 issued by the first respondent Corporation under section 351 of the Mumbai Municipal Corporation Act, 1888 as well as the order dated 12th April 2002 passed by the second respondent on the basis of the said notice were illegal, bad in law and

null and void. The allegation of the first respondent in the notice dated 5th March 2002 was that the appellant has carried out an unauthorised extension to his stall. In the schedule of notice it was mentioned that the unauthorised extension was of area of 9 feet x 5 feet 8 inches and 4 feet 3 inches x 2 feet 7 inches. The reply sent by the appellant was that the suit structure was in existence from the year 1957 and he was in possession of the documents to show that the said structure was in existence since then. The learned Trial Judge by the impugned judgement and decree held that the appellant has failed to establish the legality and validity of the offending structure.

3. The learned advocate for the appellant submitted that the appellant had produced assessment record to show that the suit structure was in existence prior to 1961-62. He submitted that the documents produced by the appellant clearly show that the suit structure was in existence prior to datum line fixed by the first respondent. He invited my attention to the affidavit of evidence of witness examined by the appellant and submitted that number of documents were proved through the said witness. He has

invited my attention to various documents placed on the record of the suit.

4. It must be noted here that a written statement was not filed by the respondents. Shri Xavier appearing for the respondents submitted that the burden was on the appellant to establish that the structure was in existence before the datum line. He submitted that none of the documents relied upon and produced by the appellant relate to the structure described in notice dated 5th March 2002. He submitted that the said documents have been rightly discarded by the learned Trial Judge. When a query was made to the learned advocate for the respondents as to why there was hardly any challenge to the said documents which were referred to in the plaint, he submitted that for the reasons beyond the control of the respondents the written statement could not be filed and therefore, an opportunity may be granted to the respondents to file written statement and to lead evidence by remanding the suit to the Trial Court. However, the learned advocate could not point out the reasons for not filing the written statement. As I found that in large number of suits where challenge is to the notice of demolition of unauthorised structures,

the written statements have not been filed by the first respondent Corporation, by order dated 18th January 2007 I directed the concerned Law Officer of the first respondent to file an affidavit setting out reasons why the written statement was not filed.

5. Accordingly, an affidavit of Shri S.H.Ujjainwalla, working as Advocate and Law Officer with the first respondent has been filed. He stated that necessary action will be taken after calling for the explanation of the concerned person who has committed the lapse. It is stated in the affidavit that he has issued a Circular directing all the Advocates and Assistant Law Officers and Junior Law Officers as well as Managing Clerks who are assigned the work of looking after the cases pending in the City Civil Court, Mumbai, to forthwith submit reports as to in how many pending matters written statements are not filed.

6. Shri Walawalkar, learned Sr.Counsel appearing on behalf of the respondents submitted certain documents. He pointed out a chart showing number sanctioned posts in the law office of first respondent Corporation and pointed out that steps

are being taken to immediately fill in 36 vacancies in the legal department. He pointed out that two posts of Deputy Law Officers, three posts of Assistant Law Officers and one post of Senior Legal Assistant are vacant and steps are being taken to fill in the said posts. He stated that now there is a proposal to increase the posts of Deputy Law Officers and Assistant Law Officers. He stated that even additional posts of Managing Clerks and Typists are necessary. Insofar as City Civil Court, Mumbai is concerned, he stated that additional staff of one Deputy Law Officer, eight Assistant Law Officers, one Superintendent (Court), eleven Managing Clerks, twelve Clerks, and three peons is required to cope up with the work load of the said Court. In fact, a copy of the note was submitted before me which was placed before the Additional Municipal Commissioner for increasing the number of posts in the legal department. Shri Walawalkar submitted that in many cases the default occurs as the members of the staff are inadequate to deal with large number of cases. I have observed in large number of appeals arising out of the suits filed for challenging the notices of demolition issued by the first respondent that written statements are not filed by the first

respondent. As a result, in such cases a very limited cross examination of the witnesses examined by the plaintiff is being made by the advocates appointed by the first respondent Corporation on account of handicap of not filing the written statement. In a city like Mumbai, non filing of written statements in such suits may have very serious consequences. Therefore, at least in such matters the first respondent should be prompt and should file the written statement. Now, after the recent amendment to the Code of Civil Procedure, 1908 the written statement will have to be filed within a period of 30 days from the date of service of summons. It is necessary that the proposal for creating more posts in the legal department of the first respondent should be scrutinized expeditiously so that public cause should not suffer. It is necessary for the first respondent and in particular the officer incharge of the legal department to create a machinery so as to ensure that no suit challenging the orders of demolition goes undefended for want of written statement.

7. Turning back to the controversy involved in the appeal, I find that the request made by the learned counsel appearing for the first

respondent for passing an order of remand deserves to be accepted. There will be no prejudice to the appellant as even after remand, his structure will be protected till final disposal of the suit. Moreover, the appellant can be compensated by awarding costs. Hence, I pass following order.

8. ORDER :-

(a) The impugned Judgement and Decree dated 28th July 2006 is quashed and set aside and the L.C.Suit No.2241 of 2002 is restored to the file of the Trial Court;

(b) Parties are directed to appear before the Trial Court on 23rd April 2007 at 11.00 a.m.. The respondents will file their written statement within a period of one week from 23rd April 2007. No further extension of time will be granted for filing the written statement;

(c) The respondents will be entitled to recall the witnesses examined by the appellant for further cross examination. After the written statement is filed by the respondents, it will be open for the appellant to recall his witnesses

for recording further examination-in-chief. The appellant will also be free to lead additional evidence;

(d) The learned Trial Judge shall dispose of the suit as expeditiously as possible and preferably on or before 31st December 2007;

(e) Till the final disposal of the suit both the parties will maintain status-quo as of today in respect of suit structure;

(f) The respondents will pay costs of Rs.5,000/- (Rs.Five thousand only) to the appellant within a period of six weeks from today;

(g) Appeal is partly allowed in the above terms;

(h) The Law Officer of the first respondent will place a copy of this judgement before the Commissioner of the first respondent.

(A.S.OKA, J.)